The infants Ahmad and Mohamed Hanafiah will have their costs taxed as between solicitor and client out of the estate.

The infant children of Nuriah deceased Mohamed Salleh and Mariam were originally represented by the 1st Plaintiff who is their grandmother but when it became possible that she might be liable as a co-trustee their interests became conflicting so that they had to be separately represented. I think they are entitled to their costs as between solicitor and client out of the estate as from the date when they became separately represented.

I would add in conclusion that as between the two Plaintiffs I think there can be no doubt that they are entitled to two sets of costs. Their interests were clearly divergent and in fact the 1st Plaintiff has been during a great part of the proceedings rather in the position of a defendant. Application was made at the close of the hearing to have her made a Defendant instead of a Plaintiff but this was opposed and I refused the application as being made too late. Such a change at so late a stage might in my opinion have tended to complicate still further an already sufficiently complicated case.

Judgment accordingly.

Solicitors for the 1st Plaintiff—*Aubrey Davies & Co.*
Solicitors for the 2nd Plaintiff—*Allen & Gledhill.*
Solicitors for the 1st Defendant—*Johannes & Sammy.*
Solicitors for the 2nd Defendant—*Rodyk & Davidson.*
Solicitors for Ahmad bin Haji Ali & Mohamed Hanafiah—*E. E. C. Thuraisingham.*
Solicitors for Omar & Marican—*Braddell Bros.*
Solicitors for mortgagee of the share of 2nd Plaintiff—*John G. Campbell & Co.*

(Original Civil Jurisdiction)

Whitley, J.

March 24, 1933.

SEAH ENG LIM ..... **Plaintiff.**

vs.

THE P. & O. BANKING CORPORATION LIMITED ..... **Defendants.**

(Singapore Suit No. 619 of 1932)

Shares—Scrip—blank transfers—Bought and Sold notes—deposit as security—right to recover.

The plaintiff delivered to a firm of brokers the scrip for a number of shares of which he was the registered owner. The scrip was accompanied by the usual blank transfers. A cheque for an amount representing about 70% of the market value of the shares was handed to the plaintiff who also received Bought and Sold Notes relating to the shares. The brokers had opened an account with the defendants under an arrangement whereby the brokers deposited shares with the defendants. The defendants advanced money to the brokers on the security of such shares. The brokers in turn used these moneys to finance carrying transactions with their clients. The scrip the subject of dispute in this action was delivered by the brokers to the defendants in pursuance of the arrangement between them.

The plaintiff applied to the defendants for the return of the shares and tendered to them the amount advanced to them but the defendants refused to deliver them except on payment of their full market value. On behalf of the defence it was urged *inter alia* that the effect of the contracts between the plaintiff and the brokers was that the shares were sold outright and that the plaintiff acquired the right to repurchase the shares at any time within 3 months.

Held, that though there was nothing on the face of the Bought and Sold Notes to indicate that the brokers by virtue of the Notes became the owners of the shares there was ample evidence that the real intention of the parties was that the shares should be a security for repayment of the loan made to the plaintiff.

Alderson v. White, 44 Engl. Reps. 924; *Douglas v. Culverwell*, 4 de G.F. & J. 20; *Allenby v. Dalton*, 5 L.J.K.B. 312; *Manchester Sheffield Ry. v. North Central Wagon Co.* 13 A.C. 554; *Barton v. Bank of New South Wales*, 15 A.C. 379, applied.

Held further, that the defendants had no title to the shares against the plaintiff except to the extent of what was due from the plaintiff to the brokers and that on the payment of the sum due on the account between the plaintiff and the brokers, the plaintiff was entitled to recover the shares, or their value, from the defendants.

Fry v. Smellie, (1912) 3 K.B. 282 distinguished. *France v. Clarke*, (1884) 26 Ch. 257 applied. *Langton v. Waite*, L.R. (1868) 6 Eq. 165 followed.

ACTION tried before Whitley, J.

The facts and arguments sufficiently appear from the Judgment below.

Eber & Williamson for the Plaintiff.

Cobbett & W. L. Stevens for the defendants.

Cur. Adv. Vult.

Whitley, J.—The Plaintiff in this case was at all material times managing director of the Sze Hai Tong Banking and Insurance Company and the Defendants are a banking company incorporated in England and having a branch office in Singapore. The shares the return of which the Plaintiff claims in this action were his property up to the 25th February 1930 and on the 26th and 27th February 1930 they came into the hands of the Defendants as the result of certain transactions carried out between the Plaintiff and Rose Macphail and Penman Limited and between the latter and the Defendants. It will be convenient hereinafter to refer to Rose Macphail and Penman as "the Brokers". The precise nature of these transactions is in dispute but there are a number of admitted facts the more important of which I will now set out.

In February 1930 the Brokers opened what was known as a carrying account with the Defendants under an arrangement whereby the Brokers deposited shares with the Defendants and the Defendants on the security of such shares advanced sums of money to the Brokers. The Brokers in their turn used these monies to finance carrying transactions with their clients.

On 25th February 1930 the Plaintiff handed to the Brokers scrip for 3400 Raub Australian Gold Shares, 30,000 Malayan Consolidated Tin Dredging Shares and 31,977 Menglembu Lode Shares. I shall refer to these shares as Raubs, Consols and Menglembus respectively. The scrip was accompanied with the usual blank transfers signed by the registered owner. The market price of these shares at that time was over $50,000.

In return the Brokers handed to the Plaintiff a cheque for $36,000 drawn on the Defendant Bank which was duly cleared. The Plaintiff received from the Brokers Bought and Sold Notes in the usual form dated 26th February 1930. They read as follows:—

SHARE SALE CONTRACT

To Seah Eng Lim Esq.,

We have this day SOLD for your account shares as follows:—

No. of shares (3,700) Three thousand seven hundred.

Name of Shares Raub Australian Gold Mining Co., Ltd.

Price of Share ($6.90) Dollars six & Cents ninety Nett.

Delivery Ready.

Rose Macphail & Penman Ltd.

.....Director.

SHARE PURCHASE CONTRACT

To Seah Eng Lim Esq.,

We have this day BOUGHT for your account shares as follows:—

No. of shares (3,700) Three thousand seven hundred.

Name of Shares Raub Australian Gold Mining Co., Ltd.

Price of Share ($7.13.79) Dollars Seven and Cents thirteen point seven nine nett. Cash on delivery of transfer.

Delivery Three months B/O.

Rose Macphail & Penman Ltd.

.....Director.

Similar Bought and Sold Notes were sent to him in respect of the Consols and Menglembus. In each case the price on the Bought Note works out exactly at the price on the Sold Note plus brokerage and interest at 12% for 3 months. The prices on the Sold Notes are admittedly substantially (20% to 30%) lower than the then prevailing market prices.

On the 26th and 27th the scrip received from the Plaintiff by the Brokers was delivered by them to the Defendants. The Raubs which were the only dividend paying company had been meanwhile registered in the name of Mr. Penman the Managing Director of the Brokers' firm and a new blank transfer signed by him was attached to the scrip. In his evidence he stated that he had forgotten this fact but probably did it to protect dividends. I shall deal with this point later. The other shares were handed over with the same blank transfers which had been received from the Plaintiff.

On 26th May 1930 the Brokers agreed with the Plaintiff to recarry for a further 3 months and new Bought and Sold Notes were sent to him the prices being varied slightly accordingly to whether the market prices had risen or fallen but still remaining approximately 70% of the prevailing market prices.

In July the Plaintiff took up 1000 of the Raubs by paying the amount due upon them and the Brokers obtained the scrip therefor from the Defendants for him leaving a balance of 2400 Raubs still in the hands of the Defendants.

On the 25th August 1930 being the day before the expiration of the second 3 months the Plaintiff through his lawyers called for delivery of all the outstanding shares from the brokers who replied informing him that the shares were deposited with the Defendants. They enclosed a bill and delivery order showing the sum due ($32,479.90) and asked him to arrange delivery direct from the Defendants. This bill includes in addition to the shares already referred to a further 13,000 Consols which were by consent deleted from the claim in the course of the hearing. It would seem that the figure 32479.90 ought to be correspondingly reduced to 29262.40 but no amendment in respect of this figure was applied for.

When Plaintiff applied to the Defendants for delivery of the shares in return for $32,479.90 they refused to deliver the same unless he paid them the full value of the shares—some $40,000—and they have adhered to this attitude throughout.

The position at that date was that the Brokers did not deny the Plaintiff's right to have his shares redelivered to him on payment by him of $32,479.90 and that the Defendants did not refuse to redeliver them to him but said that amount was not sufficient.

The Writ in this Suit was not issued until the 14th June 1932 and the Defendants point to this long delay as an indication that the claim is not a genuine one but an afterthought. The Plaintiff explains the delay by the complications which ensued through the Brokers having gone into liquidation in September 1930 and further by his desire not to precipitate matters until after the determination of another action which was instituted by Macphail & Co. Ipoh against the same Defendants. I regard these explanations as reasonable and it is quite clear from the correspondence that the Plaintiff notified the Defendants as far back as August 1930 what his contention was.

By his Statement of Claim delivered on 2nd September 1932 the Plaintiff sets out the material facts upon which he relies and alleges that the shares were

mortgaged by him to the Brokers who in their turn deposited them with the Defendants who knew that the shares were not the property of the Brokers and also knew that the Brokers had only a limited authority to deal with them. By paragraph 11 he alleges that on the 29th August 1930 he applied for the balance of shares and tendered to the Defendants $32,479.90 and that the Defendants refused to deliver the shares unless he paid the full market value. The allegations in this paragraph are admitted by paragraph 22 of the Defence. The Plaintiff claims:—

(a) a Declaration that the deposit of the share certificates relating to the shares particularised in the List attached hereto by the said Rose Macphail and Penman Limited with the Defendants conferred no better title on the defendants than that held by the said Rose Macphail and Penman Limited.

(b) an order that upon payment of the sum of $32,479.90 the defendants do deliver to the plaintiff all documents relating to the said 2400 shares in the Raub Australian Gold Mining Coy., Ltd., 43,000 shares in the Malaya Consolidated Tin Dredging Coy. Ltd., and 31,977 shares in the Menglembu Lode Coy., Ltd.

(c) for damages for their detention.

(d) Alternatively for damages for their conversion.

In the course of the hearing prayer (b) was amended by substituting 30,000 for 43,000 and prayers (c) and (d) were not pressed.

By their Defence delivered the 29th September 1932 the Defendants admit that they knew that the transactions between the Plaintiff and the Brokers were share carrying transactions but say that it was never contemplated that the Brokers should be under any obligation to return the actual scrip and that the Brokers' authority was not limited. They contend that the effect of the contracts between thte Plaintiff and the Brokers was that the shares were sold outright to the Brokers and that the Plaintiff acquired the right to repurchase the number of shares referred to at any time within 3 months. They further contend that if the Plaintiff is entitled to any damages such damages have been allowed in account by the Brokers.

By his reply dated 31st October 1932 the Plaintiff alleges that the Defendants were fully aware that the relationship between him and the Brokers was that of borrower and lender and that the Brokers only had a limited interest in the shares co-extensive with the amount advanced thereon. He further says that he has never accepted the Brokers' account and has always denied the right of the Brokers to evade liability to deliver shares by allowing any margin between the market price of the shares on the 29th August 1930 and any purchase consideration on any contract.

I will deal with this last point first as it can be disposed of very shortly. The agreed correspondence and particularly the last letter from the Liquidator make it quite clear that the accounts as between him and the Plaintiff have not yet been agreed and it seems obvious that the final adjustment must largely depend upon the result of this case. The Plaintiff has not accepted the accounts, he is not bound by them and there can be no bar to his present claim.

The first question which I have to decide is what was the nature of the transaction between the Plaintiff and the Brokers? Did the contracts pleaded by the Defendants constitute a sale of specified shares outright by the Plaintiff secured by an equitable mortgage of the shares with a proviso for redemption for a fixed amount within a certain period. In other words was the relationship between the Plaintiff and the Brokers that of seller and buyer or that of mortgagor and mortgagee?

The Defendants rely firstly upon the Bought and Sold Notes. They are headed respectively "Share Purchase Contract" and "Share Sale Contract" which the Defendants say definitely indicate a purchase and a sale. But they do not indicate a purchase by or a sale to the Brokers. They read "We have sold for your account" and "We have bought for your account". The words "We have sold for your account" indicate that the Brokers had as brokers sold the shares to some one else. None of the sale notes evidence a sale to the Brokers themselves. Consequently there is nothing on the face of the Sold Notes themselves to support the Defendants' contention that by virtue of those Notes the Brokers became the owners of the shares and that the Plaintiff thereby divested himself of his ownership in favour of the Brokers. But these Bought and Sold Notes although purporting to represent the terms of contracts reduced into writing are not conclusive as to the nature of the transaction and evidence *aliunde* is admissible to show what the parties really intended. It is often difficult to distinguish between a mortgage and a sale with a power to repurchase such as the Defendants contend to be the effect of these Bought and Sold Notes. The modern attitude of the Courts is expressed by Lord Cranworth in *Alderson* v. *White*, 44 English Reports at page 928. "The rule of law on this subject is one dictated by commonsense; that *prima facie* an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase." Similarly a conveyance in form absolute would be held a mortgage if the intention were that it should be

security for a loan and the payment of interest will be evidence of such intention (*Douglas v. Culverwell*, 4 de G.F. & J. 20 and *Allenby* v. *Dalton*, 5 L.J.K.B. 312). In all these cases the question is what was the real intention of the parties (Lord Macnaghten in *Manchester Sheffield Ry.* v. *North Central Wagon Co.*, 13 A.C. at p. 568) and where difficulty in determining whether a conveyance is intended to be a mortgage or not extrinsic evidence will be admitted to show what appears on the face of it to be an absolute conveyance was intended to be a conveyance by way of mortgage only (*Barton* v. *Bank of New South Wales*, 15 A.C. 379).

Direct evidence as to the arrangement made between the Plaintiff and the Brokers was given by Mr. Penman the Managing Director of the Brokers' firm. His evidence if it can be relied upon is clearly the most authoritative that one could have on this point and I would state at once that I regard him as a most straightforward and reliable witness. He is quite disinterested and has every reason to recollect vividly the main events of that fateful year in his firm's history. He stated that in February 1930 the Plaintiff asked him if he would carry shares for him by advancing money on the security of the shares. Apparently the word "Carrying" in connection with shares covers a variety of types of transactions but we are only concerned with the carrying arrangement actually made with the Plaintiff. The shares belonged to the Plaintiff. The Brokers lent him $36,000 being 70 % of their approximate market value which was over $50,000. The Brokers charged him interest at the rate of 12 % and brokerage and the Plaintiff was to be entitled to redeem the shares within 3 months on paying to the Brokers the principal money plus the agreed interest and brokerage. The Brokers in their turn deposited the shares with the Defendants as security for overdraft on which they paid 6½ to 7 % so that they made a profit of 5 % on the transaction. When the 3 months elapsed the loan was renewed for a further 3 months as I have already described. The Bought and Sold Notes were sent to the Plaintiff as evidence of the transaction, those forms being used as they are the only ones which the Brokers kept. It seems to me that the whole of the probabilities are in favour of this version of the transaction. It is incredible that any business man would sell outright for $36,000 shares which would fetch in the market $50,000. If it was a sale outright why should interest be charged and why should the price be fixed at 70 % of the prevailing market price and not at the full market price? In the case of a sale one expects the seller to ask for and receive the prevailing market price whereas in the case of a mortgage the mortgagee ordinarily only advances a sum appreciably less than the value of the security. The price stated in the Bought notes in each case works out at exactly the price in the Sold Note plus 12 % interest and brokerage—in the case of the Raubs it is taken to two points of decimals (Seven Dollars 13.79 cents). In my opinion the evidence both circumstantial and direct points overwhelmingly to a loan at interest on the security of the shares. Accordingly I hold that the relationship between the Plaintiff and the Brokers was that of mortgagor and mortgagee and not seller and buyer.

The Plaintiff was present in Court but Mr. Eber did not call him as a witness. From that the Court is entitled to draw inference against him but I am disposed to agree with his counsel's submission that as it was admitted that the shares in question were his property there was no point upon which he could add to the very complete and convincing evidence given by Mr. Penman.

It being established that the Plaintiff merely deposited the shares with the Brokers without any intention that the Brokers should sell pledge or otherwise deal with them and that the Brokers deposited them with Defendants the next question to be considered is what in law is the position of the Defendants *vis-a-vis* the Plaintiff. The interest of the Brokers in the shares is limited to the amount repayable by the Plaintiff for principal interest and brokerage as stated in the Bought Notes. It is conceded that such certificates of shares are not negotiable instruments and that the mere delivery of them with the indorsed blank transfer signed irrespective of any intent on the part of the owner of the shares is not of itself sufficient to pass the title to them, the ordinary rule of law being that a person cannot transfer a better title than that which he himself has. The law on the point is fully reviewed in the case of *Fry v. Smellie*, (1912) 3 K.B. 282. In that case the registered holder of shares handed to an agent the indicia of title together with a transfer of the shares signed in blank and instructed him to borrow not less than a certain sum on the security of the shares. The agent in defiance of his instructions borrowed upon the shares a less sum than the stipulated amount. It was held that as against the principal the lender was entitled to retain the indicia of title to the shares until repayment of the loan. The facts of that case are of course quite different from those of the present case but its importance lies in the very clear manner in which the Lords Justices distinguish between the principles to be applied in cases such as *France v. Clark*, (1884) 26 Ch. D. 257 where the facts closely resemble those of the present case. Farwell, L.J. at page 294 observes:—

> "I can only say that certificates and a blank transfer are in everyday use as securities for raising money, and that every man who lends noney to A. on documents which show a title in B. is of course put on inquiry. This does not mean that we must refuse to deal with the agent at all but must refer to the principal, but that he

must make such inquiry as is reasonable under the circumstances. If he is foolish enough to lend A. without inquiry, and A. has no right or authority to deal with the documents, he loses his money, and it is perfectly immaterial whether the security is a deposit of title deeds of real estate or certificates of shares with a blank transfer. Such a question as arises in the present case can only arise when the owner of the property has authorized such a dealing with the property as is corroborated by the possession of the indicia of title. If no authority at all has in fact been given it is quite immaterial whether the lender inquires and is given an untrue answer or does not inquire at all; in either case he loses his money. But if the owner has in fact given the borrower authority to deal with the property by way of a loan or by way of sale, and has entrusted him with the indicia of title, enabling him so to deal, then the owner cannot be heard to say that there is any limit on the authority so given. If the indicia of title are apparently co-extensive with the authority claimed there is nothing to suggest any limit. The estoppel arises out of the conduct of the owner of the property. Estoppel is merely a rule of evidence which prevents the person estopped from giving certain facts in evidence. If A's conduct amounts to an invitation to B. to advance money to C. without limit on the title deeds of A's property, he cannot be heard to say that he had imposed on C. a limit any more than if he had written or said to B. that he had given C. authority to borrow money and had not mentioned any limit. If he has simply deposited his deeds with C., such deposit involves no such representation, and there is therefore no such estoppel."

Vaughan Williams, L.J. at page 289 distinguishes *France v. Clark* in the following words:—

> "In the first place, there is this important difference between *France v. Clark* and the present case. In *France v. Clark*, France, the registered holder of shares in a company, deposited the certificates together with a blank transfer with Clark as security for £150, and Clark deposited the certificates and the blank transfer with Quihampton as security for the sum of £250, previously lent to Clark by him. Clark therefore was simply a mortgagee or pledgee, and in no sense an agent of France with limited authority; and there was no need to apply the rule that an owner who gives indicia to an agent and authorizes him to deal with such indicia either for the purpose of raising money or sale, owes a duty to the person whom he intends to act on such authority to give them notice of any limit that he places on the authority Clark wrongfully pledged or mortgaged to Quihampton documents which he held as security for a loan of £150 as security for a loan of £250 previously advanced by Quihampton to him. There was no intent on the part of France to do anything but to create an equitable security in Clark as pledgee or mortgagee for £150. When one deals with transfers of this sort, not of property, but of documents giving a right to registration in the books of the company as the holder of specific shares, the relation of the transferor to the transferee is of essential importance."

and later Farwell, L.J. at page 297 referring to the same case says:—

> "Clark created a further equitable interest by depositing the certificates and blank transfer with Q. to secure £250. Q. then filled up the blank transfer to himself, and it was held that he had no authority to do so. The question of authority by holding out was never suggested, because it was obvious that a man who creates an equitable charge on his shares by such deposit and blank tranfer holds out nothing. He gives the mortgagee an equitable title, with power to complete his legal title, and to deal with that title when completed; but he gives him no authority or right over any equitable interest, except to the extent of his own mortgage. The possession of the indicia of title is consistent with the equitable mortgage created in accordance with common usage, and there is nothing else."

The facts in *France* v. *Clark* so closely resemble those in the present case that it would seem clear that the same principles must apply and in that case the Court of Appeal held that Quihampton had no title against France except to the extent of what was due from France to Clark. Accordingly on the finding of fact which I have already arrived at the Defendants should have no title to the shares against the Plaintiff except to the extent of what was due from the Plaintiff to the Brokers namely $32479.90.

Mr. Cobbett put forward an alternative defence that if the transaction between the Plaintiff and the Brokers was a mortgage the Defendants being *bona fide* holders of the shares without notice of the Brokers limited interest in the shares acquired a complete title. This was pleaded in the Defence and although in the Reply it is alleged that the Defendants were always aware of this limited interest I am very doubtful whether it is open to the Defendants to rely upon such a defence which they have not pleaded. The question was not fully argued as Mr. Eber very properly in my opinion desired to have the question of whether or not

the Defendants had notice thrashed out and to have a definite finding on the point.

There is a direct conflict of evidence between Mr. Penman and Mr. Cox who was in 1930 acting accountant in the Defendants Singapore branch as to the arrangements made between the Brokers and the Defendants. They agree however that they had been personal friends for many years and that Mr. Cox approached Mr. Penman and his co-directors with a view to obtaining for the Defendant Bank some of the Brokers' business offering generous facilities because Defendants were particularly anxious to get the business. Mr. Cox further admitted having conversation with Mr. Penman about carrying shares before the Brokers opened their carrying account with the Defendants in February 1930 and that he knew that the Brokers' object was to obtain an overdraft from the Defendants for the purpose of financing carrying transactions for clients. He says however that he always understood that the Brokers were to carry the shares at the full market value and that he was never informed of the details of the transaction between the Plaintiff and the Brokers.

Mr. Penman on the other hand states that Mr. Cox knew perfectly well that the Brokers were only advancing to their clients 70 % of the market value of the shares and that the approval of the Defendants was obtained before the cheque for $36,000 was drawn on the Defendant Bank in favour of the Plaintiff on the security of these shares. I accept the recollection of Mr. Penman in preference to that of Mr. Cox. The firm of which he was Managing Director was embarking upon a new line of business on a large scale which promised to be very profitable and he would be likely to remember clearly what he arranged with the Bank whereas to Mr. Cox he would only be one among many constituents. He and Mr. Cox, old friends, were seeing one another daily and it is only reasonable to suppose that he would inform the other as to how he was conducting this new line of business which was to be profitable to both. It is moreover significant that Mr. Cox admits that the proportion advanced by the Defendants was 65 % to 75 % of the market value. The Defendants could hardly think that the Brokers were advancing to clients 100 % on shares against which they themselves were only allowed to draw 65 % to 75 %.

I find as a fact that the Defendants had notice both expressed and implied. That being so it is not necessary to consider what would have been the position in law if they had not had notice but it would seem from the cases to which I have referred that once the original mortgage is established the question of express notice becomes immaterial as between the Plaintiff and the Defendants. The position would seem to be that where a client deposits with his broker shares as security for a loan giving the broker no authority to pledge or otherwise use the shares and the broker in turn deposits those shares with his banker as security for overdraft and informs his banker of the limited interest he has in those shares the banker takes the shares with his eyes open and must realise that he is liable to be called upon to redeliver the shares on payment of what is due on the mortgage debt. If he has advanced to the broker the same amount as the broker advanced to his client the banker suffers no loss. If he has advanced to the broker more than the broker advanced to his client he has done so at his own risk and the recovery of the balance is a matter between him and the broker. In neither case is it any concern of the client who originally borrowed from the broker on the security of the shares. If the broker knowing his own limited interest in the shares deceives the banker by not disclosing it and induces the banker to lend him the full value of the shares or to treat the shares as the broker's own property subject to no equities or limitations, as the Defendants allege the Brokers did in the present case, then again the Defendants' remedy is against the Brokers and the Plaintiff's rights would still remain unimpaired. This latter observation is of course *obiter* as the position contemplated does not arise in the present case, Mr. Penman's evidence supported as it is by all the circumstances and probabilities having satisfied me that there was no fraud by the Brokers and that the Bank was throughout kept fully informed of the nature of these particular carrying transactions which whether the actual word "mortgage" was used or not did in effect constitute an equitable mortgage by the Plaintiff to the Brokers and sub-mortgage by the Brokers to the Defendants. I use the words "these particular carrying transactions" advisedly because the evidence shows that there are quite different kinds of carrying transactions and I desire to make it quite clear that what I have said as to the rights and liabilities of the parties and the law applicable refers only to the particular set of facts which I have found to be the facts in the present case.

There are one or two minor points to which I think I ought to refer. There is the fact that Mr. Penman registered the Raubs in his own name before depositing them with the Defendants. Mr. Cobbett argued that because he failed to recollect this fact Mr. Penman's memory cannot be relied upon on other points. I think the explanation given was a reasonable one namely that ordinarily he would deliver the shares to the Bank as received from the client but that he might register them to ensure that he obtained dividends for his client. This explanation was borne out by the fact that whereas the Raubs which paid dividends were so registered the Consols and Menglembus which did not pay dividends were not so registered. It is quite natural that memory as to a detail like this three years

ago might be at fault whilst recollection as to the real nature of the transactions remains vivid and accurate.

Again the Defendants relied upon the Letter of Hypothecation which the Brokers gave them and which included the shares in question as showing that the Brokers must have regarded the shares as their property but I do not think that it necessarily goes so far as that. If as I have found the Brokers and the Defendants were both aware of the limited interest which the Brokers had in these shares it would follow that if the Defendants sold the shares as empowered by the Letter they would have to account to the Brokers for the balance realised over and above the amount of the mortgage debt. Whether under the circumstances the Brokers ought to have included these shares in the Letter is another matter. They may have realised that the Plaintiff having deposited the shares by way of equitable mortgage was entitled if he insisted to redeem the identical shares.

Finally Mr. Cobbett argued that it is impossible for the Defendants to re-deliver the shares to the Plaintiff as they are no longer in their possession having been sold, split up or otherwise disposed of. This was not pleaded and Mr. Eber quite properly objected to the point being raised. Even if it had been pleaded it could not have affected the decision in this case. The Defendants' case at the outset was that the Plaintiff must pay the full market value. They did not say that they had parted with possession of the shares. Their books show that they had shares or their equivalent in their possession upon the date when the Plaintiff sought to redeem them. Their objection was that he would not pay enough for them.

On the authority of *Langton* v. *Waite*, L.R. (1868) 6 Equity 165 it would appear that the Plaintiff was entitled to recover from the Brokers the identical shares deposited and similarly that the Brokers on the facts as I have found them were likewise entitled to demand the identical shares from the Defendants. If the Defendants no longer have the identical shares the Plaintiff will no doubt be satisfied with their equivalent but that is a matter for arrangement between them.

I was referred to the case of *Macphail & Co. Ipoh* v. *The P. & O. Banking Corporation* but as the facts in that case are distinguishable from those in the present case I have not regarded it as binding upon me. The conclusion at which I have independently arrived at is however that although the facts are different the legal position is the same as found by Terrell, J. in that case namely that when shares in the names of third parties are deposited by brokers as security against their overdraft, the value of the security depends on the original intention of the transferor in handing them to the broker. If the shares were handed to the broker for the purpose of sale or pledge, the true owner cannot set up against the bank any limit upon the authority which he gave his agent, provided that the banker is a holder for value without notice. If, on the other hand, the relation was merely that of mortgagor and mortgagee the mortgagee can, indeed, under the ordinary law, and without any authoritty from the mortgagor, sub-mortgage them to the bank, but the security, which the bank obtains, will be limited to the amount owing by the mortgagor to the mortgagee.

There will be judgment for the Plaintiff with costs.

There will be:

(a) a Declaration that the deposit of the share Certificates relating to the shares particularised in the List attached to the Statement of Claim by the Brokers with the Defendants conferred no better title on the Defendants than that held by the said Rose Macphail & Penman Limited.

(b) an order that upon payment to the Defendants of the monies due by the Plaintiff to the Brokers upon the mortgage the Defendants do deliver to the Plaintiff all documents relating to the said 2400 shares in the Raub Australian Gold Mining Coy., Ltd., 30,000 shares in the Malayan Consolidated Tin Dredging Coy., Ltd., and 31,977 shares in the Menglembu Lode Coy., Ltd.

Judgment accordingly.

Solicitors for the Plaintiff—*Chan & Eber.*

Solicitors for the Defendants—*Rodyk & Davidson.*

(Revisional Civil Jurisdiction)

Murison, C.J.

March 19, 1933.

BIKARAMA SINGH

vs.

SHIVABALAK SHAH

(District Court Case No. 426 of 1933)

(Application for Revision No. 6 of 1933)

Courts—District Court—appeal or revision—"amount in dispute"—retrial—Ordinance No. 101 (Courts) Ss. 13 (1), 38(1).

Where a plaintiff succeeded on his claim and a defendant on his counterclaim and the amount of the claim was $90/- and that of the counterclaim, $41.59:—

Held, that "the amount in dispute in the action" was the amount of the claim added to the amount of the counterclaim, and that the Assistant District Judge had no jurisdiction to try the case.

APPLICATION before Murison, C.J. for revision of Judgment given by the Assistant District Judge.

The facts are shown in the order below.

The parties were not represented by Counsel.

Cur. Adv. Vult.